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No. 97-889

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP.; STEVENS SHIPPING & TERMINAL COMPANY; STEVEDORING SERVICES OF AMERICA; RYAN-WALSH, INC.; STRACHAN SHIPPING COMPANY; CERES MARINE TERMINALS, INC.; and SOUTH CAROLINA STEVEDORES ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NOW LEGAL DEFENSE & EDUCATION FUND, ASSOCIATION OF TRIAL LAWYERS OF AMERICA, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, INC., and NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

This *Amici Curiae* brief is submitted by the National Employment Lawyers Association, the NOW Legal Defense and Education Fund, the Association of Trial Lawyers of America, Disability Rights Education and Defense Fund, Inc., and the National Partnership for Women and Families.[1] The *amici* consist of a range of organizations that either directly represent or whose members directly represent employees in employment discrimination and other civil rights cases, and who share similar concerns that mandatory arbitration deprives plaintiff employees of constitutionally and statutorily guaranteed rights and remedies.

INTRODUCTION & SUMMARY OF ARGUMENT

Over the past 15 years, it has become commonplace for economically powerful parties to impose arbitration on those with whom they deal. Frequently, the motive behind this requirement is transparent: to bypass the constitutional and statutory rights and remedies of the economically weaker party.[2]

Following *Gilmer v. Interstate/Lane Johnson Corp.*, 500 U.S. 20 (1991), employers have made a concerted effort to avoid both the judicial system and the Civil Rights Act of 1991,[3] by requiring employees to submit discrimination claims to arbitration as a condition of employment. Many lower courts—including the U.S. Court of Appeals for the Fourth Circuit in this case—have contributed to this dangerous process by expanding and misapplying *Gilmer* and other arbitration decisions of this Court. These courts have mistakenly proclaimed that there is a "public policy" favoring arbitration over our constitutional jury trial system. This position is not only unsupport-

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No persons other than the *Amici Curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief. A Description of the *Amici Curiae* is set forth in the Appendix hereto.

[2] See *Graham Oil v. ARCO*, 43 F.3d 1244, 1247-48 (9th Cir. 1995).

[3] Pub.L.No.102-166.

able as a matter of constitutional law, it misconstrues the pronouncements of this Court, the purposes underlying the civil rights laws, and the intent of the Federal Arbitration Act.[4]

What makes mandatory arbitration particularly insidious in the employment setting is the fact that employer-mandated arbitration is not simply "another forum" for the resolution of statutory employment claims. Mandatory arbitration, unilaterally designed and imposed by employers, has proven itself to be a grossly inferior, ineffective and inappropriate method for employees to enforce their statutory rights.

In the instant case, Respondent Universal Maritime Shipping asks the Court to go far beyond the holding of *Gilmer*, and to rule that an employee subject to a collective bargaining agreement has no right to bring suit in federal court on a federal statutory civil rights claim. Amici urge the Court to reject Respondent's argument and to correct the lower courts' over-extension of *Gilmer*'s narrow holding. Amici ask the Court to clarify three crucial points relating to the arbitration of statutory employment claims.

First, with respect to statutory employment rights, there is no "public policy" favoring employer-mandated arbitration. Rather, public policy favors the right of employees to have access to federal courts and a jury, in order to vindicate their statutory entitlements in the manner expressly provided for by the statute. *Second*, arbitration agreements are only enforceable if they are knowing and *voluntary*. This is consistent with the Federal Arbitration Act, and with the traditional judicial standard applied to a waiver of constitutional and statutory rights. *Third*, when employers require employees to submit to arbitration as a non-negotiable condition of employment, thereby coercing employees into forfeiting their rights, such an agreement is not "voluntary" in any real sense. Therefore, such agreements are invalid and unenforceable.

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[4] 9 U.S.C. § 1 et seq.

LEGAL ARGUMENT

A. Public Policy Does Not "Favor" Arbitration of Statutory Claims

Parties and courts seeking to enforce arbitration clauses routinely state that, "public policy favors arbitration." In fact, this assertion is completely unsupportable, *especially* in the context of unilaterally imposed arbitration of statutory employment rights. Public policy does not "favor" arbitration. To the contrary, public policy mandates preserving the right to a *jury trial*, to due process, and to a citizen's being able to enforce his or her legal rights in a public court before neutral judges who are required to follow the law.

It is often stated that "public policy" should not be created by the courts; it must emanate from the Constitution or statutory provisions. This country's "public policy" concerning its citizens' right of access to an Article III court is easily discerned and indisputable.

1. The Historic and Constitutional Roots of Public Policy

a. The Declaration of Independence

The Declaration of Independence is an appropriate place to start an examination of "public policy" in this context. It lists the grievances against the King that justified the creation of this country. Among the specific reasons stated was, "for depriving us, in many cases, of the benefit of Trial by Jury." The Declaration of Independence (U.S. 1776).

b. Article III of the Constitution

Article III of the United States Constitution created a public civil justice system administered by impartial judges, appointed for life and bound to follow the law of the land.[5] By this scheme, Article III

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[5] U.S. Const. art. III. That section vests the "judicial power of the United States," which extends "to all Cases, in Law and Equity, arising under this Constitution," in the "supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," whose judges hold

(continued...)

"protect[s] the role of the independent judiciary within the constitutional scheme of tripartite government and assure[s] the impartial adjudication in federal courts."[6]

c. The Bill of Rights

The importance attached to the jury trial was next reflected in the United States Constitution's Bill of Rights—perhaps the most compelling statement of "public policy." The Seventh Amendment provides that, "the right of trial by jury shall be *preserved*." U.S. Const. amend. VII (emphasis added). It is thus the express duty of the courts to protect and *preserve* this right, and not to condone its being coercively taken away by employers.

The Fifth Amendment to the Constitution further guarantees to citizens the right to "due process of law." U.S. Const. amend. V. The Fourteenth Amendment to the Constitution guarantees the right to "equal protection of the laws." U.S. Const. amend. XIV. At a minimum, "due process" and "equal protection" mean the right to have the laws passed for one's protection enforced correctly.

2. The Public Policy Underlying the Civil Rights Laws

a. Title VII

Congress considered the federal anti-discrimination laws[7] to be statements of critical public policy. They were deemed laws of the "highest priority" and of "paramount importance." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

(...continued)
lifetime appointments and whose compensation cannot be diminished during their terms of office. *Id.*, §§ 1-2.

[6] *Thomas v. Union Carbide*, 473 U.S. 568, 582-83 (1985); see also, R. Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv.L.Rev. 916, 943 (1988) (Article III promotes the "constitutional interest in maintaining a judicial check against arbitrariness [or] infidelity to the requirements of law").

[7] 42 U.S.C. § 2000e et seq.

Title VII of the Civil Rights Act of 1964 was landmark legislation in large part because it intended that employees would have access to the *federal courts* when bringing discrimination claims.[8] Prior to *Gilmer*, the courts consistently construed the language and legislative history of Title VII as precluding *any* binding arbitration of statutory employment claims, *even where the arbitration agreement was both voluntary and knowing*.[9] *Alexander v. Gardner-Denver*, 415 U.S. 36, 47-51 (1974); *Prudential v. Lai*, 42 F.3d 1299, 1303-04 (9th Cir. 1994); *EEOC v. Children's Hospital*, 719 F.2d 1426, 1431 (9th Cir. 1983).

In 1991, after the *Gilmer* decision, Congress passed the Civil Rights Act of 1991 ("C.R.A."), expressly giving employees the right to a *jury trial* when bringing federal discrimination claims.[10] The jury right was given to employees in exchange for a cap on damages.[11] In the C.R.A., Congress encouraged the use of alternative dispute resolution mechanisms, but only where both parties *knowingly and voluntarily* agreed to submit their dispute to the non-judicial forum that the parties deemed "most appropriate" for their particular case.[12] As Representative Edwards explained, "The section contemplates the use

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[8] 42 U.S.C. § 2000e-5(f)(3). As this Court said in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), "The purposes and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal." 415 U.S. at 56.

[9] In *Gilmer*, the Court suggested that under some circumstances, an employee could be bound to arbitrate his or her statutory claims. The Court did not delineate what those circumstances were.

[10] 10 Pub.L.No. 102-166; § 102, § 1977A(c), 105 Stat. 1071, 1073 (1991); 42 U.S.C. § 1981a(c).

[11] 42 U.S.C. § 1981a(b).

[12] Congress encouraged the use, "where appropriate and to the extent authorized by law . . . of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration." 42 U.S.C. § 1981 notes (West 1994). See *Prudential v. Lai*, *supra*, 42 F.3d at 1304-05 (in light of legislative history of Title VII and the strong public policy of protecting victims of discrimination, court will only permit arbitration of Title VII disputes where it is established that there was a knowing agreement to submit such disputes to arbitration).

of *voluntary* arbitration to resolve specific disputes *after they have arisen*, not coercive attempts to force employees *in advance* to forego statutory rights."[13]

Thus, Congress has made it clear that the federal civil rights laws: a) represent a public policy of the highest national priority; b) assure employees of the right to access to the federal courts and a jury trial; and c) mandate that employers cannot compel employees to forfeit these rights prospectively as a condition of employment.

b. The Americans with Disabilities Act

In passing the Americans with Disabilities Act,[14] Congress made sure that there was no confusion about whether employers could require employees to forfeit the statute's protections of access to a court and a jury trial:

> The Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act. This view is consistent with the Supreme Court's interpretation of title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated by reference in title I. The Committee believes that the approach articulated by the Supreme Court in Alexander v. Gardner-Denver Co. [415 U.S. 36 (1974)] applies equally to the ADA and does not intend that the inclusion of Section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities.

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 76-77 (1990).

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[13] 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) (emphasis added). No one in Congress advanced the contrary view, i.e., that the 1991 Act would allow prospective waivers obtained as a condition of employment. In fact, Congress *rejected* a provision that would have allowed the use of mandatory agreements to arbitrate. See H.Rep. No. 102-40(I), 102d Cong., 1st Sess.d (1991), reprinted in 1991 U.S.C.C.A.N. 549, 635.

[14] 42 U.S.C. § 12101 et seq.

The Conference Committee Report also explains that an arbitration agreement does not preclude judicial remedies:

> It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition could an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA.

H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990).

It is apparent from the above constitutional and statutory provisions that there is no public policy which "favors" arbitration over the right to a jury trial of statutory civil rights claims. Indeed, allowing the party who is regulated by these laws—the employer—to unilaterally "opt out" of these provisions is completely *inconsistent* with Congress' purpose in passing these statutes.

An accurate statement of public policy would be that public policy under the civil rights laws encourages and permits parties to *voluntarily* select an appropriate alternative dispute resolution mechanism to meet the needs of a particular case, *after* a dispute has arisen. But it is clearly against the policy behind the civil rights laws for employers to coerce employees into forfeiting their statutory rights to federal court judges and juries, by requiring employees to arbitrate any future disputes as a condition of obtaining employment.

3. The Federal Arbitration Act Did Not—And Could Not—Create A Public Policy "Preferring" Arbitration Over Litigation

Some courts and employers seeking to justify a policy "favoring" arbitration in the context of statutory employment laws have pointed to the Federal Arbitration Act, claiming that its passage was meant to indicate a new "preference" for arbitration. Once again, this is completely unsupportable.

First of all, a legislative statute such as the FAA *cannot* create a "public policy" which contradicts the express public policy set forth in the United States Constitution, i.e., a policy favoring the right to a jury trial and access to an Article III court.

Second, the FAA was passed 40 years before the first federal employment discrimination laws were enacted, and 65 years before the 1991 amendments to those laws. Thus, it can hardly be argued that the FAA was ever intended to create a "policy" superseding the provisions of the civil rights laws which ensured victims of discrimination access to federal courts and the right to a jury trial.

Third, the FAA was never intended to create a "preference" for arbitration, much less a "public policy" favoring arbitration. The original intent of the FAA was simply to allow *commercial* entities of *equal bargaining power* the right to use arbitration as a dispute mechanism, at a time when arbitration was held in such low regard that many courts flatly refused to enforce arbitration agreements, even if they were voluntary.[15]

In sum, Congress passed the FAA *not* to give a "preference" to arbitration, but simply to allow courts to *permit* arbitration of contractual matters arising out of a transaction between *commercial entities*[16] when such agreements were *wholly voluntary*. There is a vast difference between removing a "prohibition" on arbitration and creating a "preference" for it.

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[15] J. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 647-52 (1996) (hereafter, "Sternlight, *Panacea*"); D. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wisc. L.R. 33, 73-81, 122-23 (1997) (hereafter, "Schwartz, *Enforcing*").

[16] This court did not decide the scope of the FAA's employment contract exclusion in *Gilmer*, *supra*. Since *Gilmer*, however, several law review articles have detailed the significant legislative history supporting Justice Stevens' interpretation of the exclusion as set forth in his dissent in *Gilmer*. See M. Finkin, *Employment Contracts Under the FAA— Reconsidered*, 1997 Lab.L.J. 329 (June 1997) (hereafter "Finkin, *Employment Contracts*"); M. Finkin, *Workers' Contracts Under the United States Arbitration Act: An Essay In Historical Clarification*, 17 Berkeley J.Emp. & Lab.L. 282 (1996) (hereafter "Finkin, *Workers' Contracts*"); J. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J.Disp.Resol. 259, 265-6 (1991) (hereafter "Stempel, *Reconsidering*"); Sternlight, *Panacea*, pp. 647-52; Schwartz, *Enforcing*, pp. 73-81, 122-23.

4. Especially Where The Employment Relationship Is One of Unequal Bargaining Power, Public Policy Does Not Favor Permitting Coercive Arbitration Agreements Which Threaten Statutory Protections

Employers who seek to enforce mandatory arbitration agreements claim that they are merely seeking to uphold "freedom of contract." Congress has long determined that an unregulated free market is not always appropriate in the employment relationship.[17] That the FAA would exclude employment contracts from its intended coverage makes perfect sense, since Congress has always recognized that the employment relationship is one of inherently unequal bargaining power.

This country's entire body of labor law was created in response to this inequality in bargaining power between employers and individual employees.[18] During this century, Congress and the state legislatures have created an extensive scheme of statutory protections for workers.[19]

Whenever Congress has imposed some restraint on the way an employer can treat its employees, it has enunciated a public policy reflecting values it considered important. These statutes reflect a strong public policy of protecting employees where they cannot protect themselves, due to the vastly superior bargaining power of

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[17] See, e.g., Title VII, 42 U.S.C. § 2000 *et seq.*, which limits employers' freedom to make employment decisions for discriminatory reasons, and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, enacted in 1938, which limits employers' ability to pay substandard wages or require excessive hours.

[18] In setting forth the policy reasons underlying the National Labor Relations Act, which gave employees the right to organize and bargain collectively, Congress noted that its passage was necessary because of, "The inequality of bargaining power between employees . . . and employers. . . ." 29 U.S.C. § 151. The NLRA was designed to "restor[e] equality of bargaining power between employers and employees." *Id.*

[19] Congress alone has enacted statutes in the following areas: preventing the abuse of child labor; regulating minimum wages and maximum work hours; conferring on employees the right to organize, and to form and join unions; and prohibiting discrimination of all kinds, whether based on race, gender, age, religion or disability.

employers. In the context of mandatory arbitration agreements, imposed by employers as a condition of employment, this disparity in "bargaining" power is obvious. There is rarely any "bargaining" available to a prospective employee presented with an arbitration agreement; his or her "alternative" is to go without work.[20]

Significantly, the National Academy of Arbitrators, the leading professional organization of labor-management arbitrators, which has strongly supported arbitration in the collective bargaining context, has

[20] This Court has approved of arbitration in the organized labor (union-management) context for several key reasons. First, and most importantly, labor arbitration was agreed to by parties of roughly equal bargaining power. Second, this Court has recognized the unique trade-off inherent in collective bargaining, the finality of arbitration in exchange for labor peace (no strikes). Third, the labor arbitrator is expected to simply interpret and decide *contract* issues, arising out of the collective bargaining agreement itself. *United Steelworkers v. Enterprise Car and Wheel*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); Sternlight, *Panacea*, pp. 642-43, 653-54; Schwartz, *Enforcing*, pp. 72-73, n. 130.

But even in the organized labor context, the courts have recognized that limitations must be placed on arbitration agreements, to the extent they implicate statutory claims. *Alexander v. Gardner-Denver, supra.*

Furthermore, courts and commentators alike have recognized the vast difference between arbitration in the organized labor context and in the individual employee context. *Cole v. Burns Intern'l Security*, 105 F.3d 1465, 1476-1477 (D.C. Cir. 1997) (questioning validity of imposing the model of collective bargaining agreement arbitration onto individual employment situations where employees are attempting to enforce public statutory rights, and noting the structural protections for employees inherent in the union/collective bargaining arena); Sternlight, *Panacea*, pp. 642-43 (using labor arbitration in lieu of a union labor strike is entirely different from using individual arbitration in lieu of a public court proceeding); J. Sternlight, Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers and Due Process Concerns, 72 Tulane L.R. 1, 7 (1977) (hereafter "Sternlight, *Rethinking*").

condemned the concept of mandatory pre-dispute arbitration agreements in the individual worker context.[21]

5. This Court Has Recognized That Any "Policy" In Favor of Arbitration Only Exists With Respect to the Scope of Arbitration Agreements Which Have Been Entered Into "Voluntarily"

This Court has recognized that, despite much of the rhetoric concerning a "liberal" federal policy favoring arbitration, this simply means that if two parties have entered into a valid, *consensual* agreement to arbitrate, the courts will thereafter liberally construe the *scope* of that agreement. *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625-27, 105 S.Ct. 3346 (1985). And in *First Options v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 1925 (1995), the Court made clear that:

> . . . the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that *commercial* arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties.

First Options, supra, 115 S.Ct. at 1925 (emphasis added).

[21] In 1997, the Academy passed a resolution stating, "The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for pursuit of statutory rights." National Academy of Arbitrators Statement and Guidelines (May 21, 1997) 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997). The Academy position is based largely on the notion that the justification for the enforcement of agreements to arbitrate rests on the premise that such agreements are completely voluntary, and that voluntariness is obviously lacking when employers condition employment on submission to arbitration. See Amicus Curiae Brief of the National Academy of Arbitrators, p. 16, filed in *Duffield v. Robertson Stephens*, Appeal No. 97-15698 (9th Cir., filed August 6, 1997) (hereafter "Academy Amicus Brief in *Duffield*").

B. Mandatory Arbitration Is Not "Just Another Forum" For Resolution of Statutory Claims

In *Gilmer*, this Court upheld an arbitration agreement which required arbitration of a statutory age discrimination claim. The Court's ruling was based on several critical assumptions. First, the Court assumed that, "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 500 U.S. at 26. In other words, the Court assumed—in the absence of proof to the contrary—that arbitration of statutory employment disputes would be "just another forum," essentially equivalent to federal court for purposes of vindicating statutory rights.

The Court's second critical assumption in *Gilmer* was that, "the prospective litigant *effectively may vindicate [his or her] statutory cause of action* in the arbitral forum," such that the specific statute at issue would "continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28 (emphasis added).

In the context of employer-mandated arbitration, both of these assumptions have proven simply incorrect. Arbitration is not "just another forum," and employees are often not able to effectively vindicate their statutory rights. Employees *do* lose substantive rights, including the right to have the civil rights laws applied and enforced as written. The result is that the remedial and deterrent functions of the nation's employment laws are being undermined.[22]

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[22] This Court has long recognized that the choice of forum materially affects the substantive rights to be vindicated. *Alexander v. Gardner-Denver*, *supra*, 415 U.S. at 56. As this Court further explained in *Alexander*, "arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII." *Id.* at 57.

1. Employees Lose The Substantive Right to Have the Statutory Employment Laws Enforced Correctly, Since Arbitrators Are Not Obligated To Follow Or Apply The Law, And Arbitrators' Decisions Are Virtually Unreviewable

One of the most important substantive rights an employee has is the right to have the civil rights laws applied and enforced as written. It would do little good for employees to have numerous protective statutes enacted by Congress if the courts were then permitted to ignore or misapply those laws.

Yet, employees face precisely this situation in the arbitration context. Since courts are essentially powerless to review or correct arbitrators' decisions, arbitrators are empowered to ignore or misapply statutory law, including the civil rights laws.[23]

a. Arbitrators Are Sometimes Expressly Instructed That They Are Not Obligated To Follow Statutory Law

Arbitrators are sometimes told that they have no obligation to follow statutory law in the first place. For example, in some arbitration settings, arbitrators are specifically instructed that they "are not strictly bound by case precedent or statutory law."[24]

Even if an arbitrator feels obligated to follow the law, he or she may make an error of law. But it is virtually impossible to overturn

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[23] This is hardly surprising. The main goal of arbitration is finality. The goal of arbitration is not, and never has been, to reach the "legally correct result." See *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 8-12, 832 P.2d 899 (1992) ("by voluntarily submitting to arbitration, the parties have agreed to bear the risk [that the arbitrator will make a mistake] in return for a quick . . . and conclusive resolution to their dispute"); P. Carrington & P. Haagen, *Contract and Jurisdiction*, 1996 Sup.Ct.Rev. 331, 344-45 (1997) (hereafter, "Carrington, *Contract*").

[24] *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 76 FEP 681 (D.Mass. 1998) (quoting the Securities Industry Conference on Arbitration *Arbitrator's Manual* [hereinafter "SICA *Arbitrator's Manual*"], p. 19). Thus, in a discrimination case, NASD arbitrators are essentially being told that they need not follow the civil rights laws as written. See also Carrington, *Contract*, pp. 344-45.

even the most egregious errors of law, for two reasons. First, the standard of review is exceedingly narrow. Second, arbitrators are not required to set forth any written explanation of their decision, so there is rarely a record or written opinion to review.

b. The Applicable Standard of Review Makes It Virtually Impossible to Overturn Arbitrators' Errors of Law

With respect to arbitration awards under the FAA, the decision may not be overturned unless the arbitrator "manifestly disregards the law."[25] But this standard is virtually impossible to meet. First, vacating the award cannot be justified merely because an arbitrator made a clear error in interpretation or application of the law. 9 U.S.C. § 10; *Anaconda v. District Lodge*, 693 F.2d 35, 37-38 (6th Cir. 1982). Instead, the party must prove that the arbitrator knew the law, understood it, found it applicable, and specifically chose to ignore it. See *Health Services Management v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992); *Remmey v. PaineWebber*, 32 F.3d 143, 149 (4th Cir. 1994).

This leads to outlandish results such as *DiRussa v. Dean Witter*, 121 F.3d 818 (2d Cir. 1997), in which the arbitrator failed to award attorneys' fees to a prevailing plaintiff in a discrimination case, in plain violation of the statutory requirements. The arbitrator's plainly erroneous decision was affirmed by the courts, which stated that even though the arbitrator was clearly wrong under the law, his decision would not be modified or reversed, since there was no clear proof that the arbitrator had "known" the correct law and had then intentionally "disregarded" it. As long as the arbitrator was simply "ignorant" of the correct law, the arbitration decision would be affirmed.

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[25] *First Options v. Kaplan, supra*, 115 S.Ct. at 1923.

c. Since Arbitrators Often Give No Written Explanation or Opinion For Their Award, Overturning The Award Is Virtually Impossible

For a party wishing to challenge an arbitration award, proving that an arbitrator "knew" the law but then "purposely disregarded" it is a practical impossibility, since arbitrators are rarely required to set forth any explanation for their decision.[26] As one court noted, "When arbitrators do not give their reasons, it is nearly impossible for the court to determine whether they acted in disregard of the law." *O.R. Securities v. Prof. Planning Assoc.*, 857 F.2d 742, 747 (11th Cir. 1988); Carrington, *Contract*, pp. 397-98.

In sum, an arbitrator does not need to follow statutory law, and does not need to issue any written explanation or rationale for his or her award. Thus, it is usually *impossible* for a party to establish that an arbitrator has ever engaged in "manifest disregard." This lack of effective judicial review raises serious due process issues where arbitration has been unilaterally imposed on one party.[27]

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[26] For example, the FAA does not require arbitrators to explain their decisions or even to record the evidence on which they are based, so it is impossible to detect whether a particular award is or is not a faithful application of the controlling law. Carrington, *Contract*, p. 347. Indeed, in the securities industry, arbitrator training manuals *discourage* arbitrators from giving any written analysis, in order to avoid judicial review. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 76 FEP 681 (D.Mass. 1998) (citing materials used in National Association of Securities Dealers arbitrator training sessions).

[27] This concern was addressed by the New Mexico Supreme Court in a slightly different arbitration context. In *Carlsbad Municipal Schools v. Harrell*, 118 N.M. 470, 882 P.2d 511 (1994), the court held that when a party is forced into compulsory arbitration, the scope of judicial review may not be narrowly limited. To compel a party to arbitrate, but then to deny effective judicial oversight would be a *violation of due process*. At a minimum, if a party is forced into arbitration, the law requires that the courts have the opportunity to see whether the law was correctly applied.

Other commentators have suggested that where employees have been compelled to submit to arbitration, and have not "voluntarily" waived the right to adequate judicial review of the arbitration decision, the employee's due process rights may have been violated. Sternlight, *Rethinking*, pp. 95-97.

The problems of limited judicial review become even more acute when arbitrators are not only allowed to ignore statutory law, but when the arbitrators have no expertise in employment or civil rights law. As pointed out in *Alexander v. Gardner-Denver*, 415 U.S. 36, 57 (1974), arbitrators typically know the "law of the shop," not the civil rights laws.[28]

In *Gilmer*, the Court "assumed" that there would be "sufficient" judicial review of the arbitration decision "to ensure that arbitrators complied with the requirements of the statute." See *Gilmer*, 500 U.S. at 32, n. 4. In the real world, this assumption has proven to be groundless, as few arbitration decisions provide enough information to make such a review possible. This is yet another reason why mandatory arbitration of statutory employment claims cannot be justified.

2. The Costs To An Employee To Vindicate His or Her Rights Are Exorbitant

An employee does not have to pay a federal court judge to hear his or her discrimination claim; access to the public courts is free, once the initial $150 filing fee is paid. By contrast, employees who are required to submit to arbitration face exorbitant "forum" costs.

Parties to arbitration are routinely charged an initial filing fee of several thousand dollars. Schwartz, *Enforcing*, p. 44, n. 30. They are then often charged two or three thousand dollars *per day* in arbitration "forum fees," since arbitrators typically charge $300-400 per hour for

[28] Following a lengthy survey, the federal government's General Accounting Office expressed serious reservations about the competence of securities industry arbitrators to hear employment cases. See GAO Report HEHS-94-17, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* (March 30, 1994) (finding that securities industry arbitrators are inadequately trained to handle discrimination cases); see also, *Cole v. Burns*, *supra*, 105 F.3d at 1477 (questioning competence of arbitrators to analyze and decide purely legal issues in connection with statutory claims).

their services.[29] Schwartz, *Enforcing*, p. 44, n. 30. Over the course of an arbitration, a plaintiff may ultimately be required to pay tens of thousands of dollars in arbitration "forum fees"—*even when they have prevailed.*[30]

The outlandish costs and fees imposed on those compelled to arbitrate may act as a significant barrier to employees, and may deter employees from exercising their statutory rights. Several circuits have recently found that the imposition of such fees on plaintiffs renders such an arbitration agreement unenforceable. *Cole v. Burns*, *supra*, 105 F.3d at 1483;[31] *Paladino v. Avnet Computer*, 134 F.3d 1054 (11th Cir. 1998).

Prevailing plaintiffs who are required to pay these "forum fees" frequently suffer the additional economic burden that arbitrators may misapply or ignore statutory law, and may fail to award prevailing plaintiffs their costs or attorneys fees.[32] See *DiRussa v. Dean Witter*, *supra* (arbitrator failed to award prevailing plaintiff in discrimination

[29] This assumes that there is only one arbitrator. Often, there is a panel of arbitrators, and the forum fees will naturally rise. In *Cole v. Burns*, *supra*, the court noted that JAMS/Endispute arbitrators charge an average of $400 per hour, although fees of $500 or $600 per hour are not uncommon. 105 F.3d at 1480, n. 8.

[30] For example, in a ten day arbitration, even if there is just one arbitrator who charges $350 per hour, the cost to the parties (based on an eight hour day) would be $28,000 in arbitration fees, plus the initial filing fee of several thousand dollars. Thus, a plaintiff employee might have to pay $15,000 in "forum fees," just to vindicate his or her statutory rights.

[31] In *Cole*, the Court stated that, "In our view, an employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure resolution of statutory claims under Title VII (any more than an employee can be made to pay a judge's salary). If there is any risk that an arbitration agreement can be construed to require this result, this would surely deter the bringing of arbitration and constitute a de facto forfeiture of the employee's statutory rights." 105 F.3d at 1468.

[32] Congress encouraged victims of discrimination to vindicate their statutory rights under Title VII by shifting a prevailing plaintiff's reasonable attorneys fees and costs to the losing party. 42 U.S.C. § 2000e-5(k). The failure of arbitrators to award fees and costs to a prevailing plaintiff undermines one of the critical features of the civil rights laws.

case costs and attorneys fees, even though such an award was required under the civil rights laws; court powerless to correct this error).

3. In Arbitration, Significantly Limited Discovery Unfairly Burdens Employees Attempting to Vindicate Statutory Rights

Arbitration works best when it involves parties of equal bargaining power who have equal access to the evidence. However, a plaintiff in a discrimination case is at a severe disadvantage in an arbitration setting. An employee generally needs extensive discovery if she is going to establish her claims. The plaintiff not only has the burden of proof, but the plaintiff in many employment cases (including discrimination cases) must prove "state of mind," or show "pretext" by the employer, or show a "pattern" of discrimination or conduct. Without full and complete discovery, an employee/plaintiff is greatly handicapped in attempting to prove her claims.

In litigation, such discovery is easily accessible through the Federal (or state) Rules of Civil Procedure. However, arbitration permits very little, if any, discovery. Whatever limited discovery may be allowed is left to the discretion of the arbitrator. Schwartz, *Enforcing*, pp. 46-47. Significantly, the severe limitations on discovery in arbitration heavily favor the *employer* in any employee/employer dispute, since *the employer usually controls almost all of the critical evidence in a case*.

An employee typically needs to obtain documents from the employer, gather statistical evidence from the employer and, perhaps most importantly, take depositions of the employer's employees.[33] The employer not only possesses most of the written evidence relevant to the case, but the employer has full access to the various employees and managers who may be witnesses. This poses a major problem for employee/plaintiffs, because the plaintiff's attorney is ethically precluded from even contacting these employees. See Schwartz, *Enforcing*, pp. 46-47, 61; Model Code of Professional

[33] Other employees are usually the most critical witnesses in an employment case.

Responsibility DR 7-104(A) (1989); Model Rules of Professional Conduct Rule 4.2 (1995). Thus, the *only* method of obtaining information from these employee witnesses is by taking depositions. Yet depositions are often either prohibited or extremely limited in arbitration.[34]

4. Employees Lose the Benefit of Evidentiary Protections

A further obstacle to employees in arbitration is the fact that arbitrators are not required to follow the rules of evidence. This means that employees may lose the benefit of significant evidentiary protections. Schwartz, *Enforcing*, pp. 49-50. For example, in sexual harassment cases, consensual sexual activity of the plaintiff with persons other than the harasser are generally deemed irrelevant and invade the plaintiff's right to privacy. Such evidence is thus specifically excluded in many jurisdictions. See Schwartz, *Enforcing*, p. 49, n. 44; Federal Rule of Evidence 412. Yet arbitrators are not obligated to comply with such evidentiary restrictions, and so procedural protections may be lost.[35]

[34] In arbitration, there is a presumption against taking depositions, and permission to take depositions is usually only granted in order to preserve testimony of key witnesses who will be unable to testify in person at the arbitration hearing. Schwartz, *Enforcing*, p. 46, n. 34. In addition, employers who draft a mandatory arbitration agreement will sometimes place specific, severe restrictions on the amount of discovery permitted in any arbitration proceeding, by barring depositions altogether or by severely limiting their number. See, e.g., *Hooters of America v. Phillips*, Case No. 4:96-3360-22 (D.S.C., March 12, 1998).

[35] See *Prudential v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (in a sex harassment case, the remedies and procedural protections available in arbitral forum may differ significantly from those contemplated by the legislature, to the detriment of the employee).

C. Developments Since *Gilmer* Have Demonstrated That Mandatory Arbitration of Statutory Employment Claims Is Inappropriate

In *Gilmer*, the Court stated that it would not accept "generalized attacks" and "speculat[ion]" about the suspected shortcomings of arbitration, especially since the plaintiff in *Gilmer* had made no specific showing of actual problems with the process. 500 U.S. at 30. However, since *Gilmer* was decided, there have been numerous studies, surveys, and articles dealing with how mandatory arbitration of statutory employment claims has worked in the "real world." In sum, it has now been empirically demonstrated that mandatory arbitration places the employee at a *severe disadvantage*, and that outcomes in arbitration are far more favorable to employers than employees when compared to similar cases brought in a public court.

1. Repeat User Bias

This Court has repeatedly held that constitutional due process entitles parties to unbiased decision-makers.[36] Since arbitrators rely on repeat business for income, many commentators have expressed a serious concern about the potential for an arbitrator's bias in favor of "repeat users," i.e., a natural tendency to favor the party which has the potential of using the arbitrator's services again.[37]

In the employment setting, the "repeat users" are the employers. Thus, there was always the perception that arbitrators will favor the employer's side. Significantly, there is now an empirical study showing that this "repeat user" bias exists *in fact* in employment arbitration. Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emply.Rts.& Empl.Policy Journal 1 (1997) (employees recover a lower proportion of their claims in repeat player cases

[36] *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 824 (1986); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

[37] See, e.g., Sternlight, *Panacea*, pp. 684-85; Schwartz, *Enforcing*, pp. 60-61 (individual arbitrators have an economic stake in being selected again, and their judgment may well be shaded by a desire to build a "track record" of decisions that corporate repeat users will view approvingly).

than in non-repeat player cases). The significance of this survey is enormous, since it confirms the reality of the "repeat user" bias in employment arbitration.

2. Surveys Show That Employers Are Far More Successful In Arbitration

Several studies and surveys since *Gilmer* have shown that employers fare much better under mandatory arbitration programs than they do in court before a jury. Employers not only win more often in arbitration, but employees who do prevail are awarded far less in damages.[38]

This is consistent with studies indicating that, when a petition to compel arbitration is filed, it is always the *employer* which is seeking to compel arbitration, while the employee is inevitably attempting to bring his or her claims in federal or state court. Schwartz, *Enforcing*, p. 62, n. 88. As an intuitive matter, employers would not be uniformly seeking an arbitration forum unless they felt it gave them an advantage over employees.

3. Counsel For Employers Repeatedly Recommend That Employers Use Mandatory Arbitration Because They Will Win More and Pay Less

Attorneys who counsel employers repeatedly and publicly urge employers to impose mandatory arbitration. These attorneys boldly proclaim that employers who require arbitration are more likely to prevail; are likely to pay less in damage awards; are far more likely to avoid an assessment of punitive damages; and may succeed in

[38] See Bompey & Pappas, *Is There A Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 Emp.Rel.L.J. 197 (1994); R. Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Labor L.J. 381 (1996); Schwartz, *Enforcing*, pp. 64-66.

discouraging the employee from instituting or pursuing his or her claims, due to the costs and other obstacles imposed by arbitration.[39]

4. Government Agencies, Professional Organizations and Legal Scholars Have Strongly Opposed and Condemned Mandatory Employment Arbitration of Statutory Claims

Since *Gilmer*, various government agencies, commissions, commentators and professional organizations have strongly opposed mandatory employment arbitration of statutory claims.

a. The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission, the agency charged with enforcing the civil rights laws, has issued an extensive policy statement dealing with mandatory arbitration. The EEOC stated that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in the federal anti-discrimination statutes," and are thus illegal and unenforceable.[40] EEOC, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, 133 Daily

[39] See Schwartz, *Enforcing*, p. 63; Bompey & Pappas, *Is There A Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 Emp.Rel.L.J. 197 (1994); see also, BNA Employment Discrimination Report, 1996, Vol. 6, p. 875 (summarizing comments of Paul Cane, a management employment law attorney, made at a conference sponsored by the Labor and Employment Law Section of the State Bar of California, recommending that employers use arbitration agreements because the employer has a better chance of winning in arbitration, damage awards tend to be lower, an arbitrator is less likely to award punitive damages or significant emotional distress damages, the employer can avoid discovery and depositions, and employees may be discouraged from bringing cases forward in the first place if they are faced with arbitration.)

[40] Perhaps recognizing the questionable nature of its compulsory arbitration process, the National Association of Securities Dealers voted in August 1997 to abolish mandatory arbitration of statutory employment discrimination claims. This proposed rule change has not yet been adopted by the Securities and Exchange Commission.

Lab.Rep. (BNA) E-4 (July 11, 1997) (hereafter, "EEOC, *Policy Statement*"). The courts traditionally give "great deference" to the EEOC's views of the proper procedure for vindicating Title VII rights. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988); *Albermarle Paper v. Moody*, 422 U.S. 405, 431 (1975).

Among the EEOC's objections are that arbitration is not governed by the statutory requirements and standards of Title VII; it is conducted by arbitrators given no training and possessing no expertise in employment law; it routinely does not permit plaintiffs to receive punitive damages and attorneys fees to which they would otherwise be entitled under the statute; and it forces employees to pay exorbitant "forum fees" in the tens of thousands of dollars, greatly discouraging aggrieved employees from seeking relief.[41]

b. The National Academy of Arbitrators

The National Academy of Arbitrators, the leading organization of professional labor-management arbitrators and the body which gave labor arbitration its credibility, has also condemned mandatory arbitration of employment disputes. In 1997, the Academy stated that it "opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights."[42]

[41] See EEOC, *Policy Statement*; Amicus Curiae Brief filed by EEOC in *Duffield v. Robertson Stephens*, No. C-95-0109-EFL (N.D.Cal. filed August 4, 1995); *Cole v. Burns, supra*, 105 F.3d at 1479 (discussing EEOC's position in numerous amicus curiae briefs filed around the country); *Rosenberg v. Merrill Lynch*, 76 FEP 681 (D.Mass. 1998) (noting EEOC's position as stated in the EEOC's own official policy statements and in brief submitted to the court).

[42] Recently, the Society of Professionals in Dispute Resolution ("SPIDR"), one of this country's leading organizations of neutrals, announced that it, too, was opposing mandatory employment arbitration. In a January 1998 policy statement issued by the SPIDR Board of Directors, the organization stated that it, "is in substantial agreement with the position taken by the National Academy of Arbitrators in opposition to agreements imposing arbitration of statutory rights as a condition of employment." Statement on Arbitration of

(continued...)

National Academy of Arbitrators Statement and Guidelines, 103 Daily Lab.Rep. (BNA) E-1 (May 29, 1997).

The Academy has expressed strong concern that mandatory arbitration often results in arbitral forums which do not provide elements of fundamental fairness to employees, and in which arbitrators are often not able or willing to enforce the claimed statutory rights. See Amicus Curiae Brief of the National Academy of Arbitrators, filed in *Duffield v. Robertson Stephens*, Appeal No. 97-15698 (9th Cir., filed August 6, 1997) (hereafter "Academy Amicus Brief in *Duffield*").

The Academy was particularly disturbed by the fact that mandatory arbitration, imposed by employers as a condition of employment, was simply not "voluntary."[43]

c. The Dunlop Commission

The requirement of voluntariness is also supported by the recommendations of the "Commission on the Future of Worker-Management Relations" (the "Dunlop Commission"), a blue ribbon Presidential commission. In its December 1994 "Report and Recommendations," the Dunlop Commission stated that, "binding arbitration agreements should not be enforceable as a condition of employment." Commission on the Future of Worker-Management Relations: Report and Recommendations (December 1994), pp. 34-35.

The Dunlop Commission expressed a concern about

> the potential for abuse of ADR created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. These concerns are obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment.

(...continued)
Statutory Rights Imposed as a Condition of Employment, Approved by SPIDR Board of Directors, January 24, 1998.

[43] See discussion in Section D.1, *infra*.

Commission on the Future of Worker-Management Relations: Report and Recommendations (December 1994), pp. 28-29.

d. The National Labor Relations Board

The National Labor Relations Board has also challenged mandatory employment arbitration agreements as being illegal. In a 1996 report, the General Counsel of the NLRB concluded that mandatory binding arbitration clauses, imposed as a condition of employment, violated the National Labor Relations Act. NLRB General Counsel Report, 1996 Daily Lab.Rep. 36 E-4, E-6,7 (Feb. 23, 1996).

e. Academics and Legal Scholars

Since *Gilmer*, some of the country's most prominent employment law professors and legal scholars have written law review articles in which they conclude that mandatory arbitration of statutory employment claims—imposed by employers as a condition of employment—is unlawful.[44] The reasons include the absence of a "voluntary" waiver of rights, a lack of constitutional due process in the arbitration system, the basic conflict with the purposes and language of the civil rights laws, and the fact that the FAA simply does not apply to employment contracts.

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[44] See, e.g., J. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy In Wake of Gilmer*, 14 Hofstra Lab.L.J. 1 (1996); P. Carrington & P. Haagen, *Contract and Jurisdiction*, 1996 Sup.Ct.Rev. 331 (1997); R. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Calif.L.Rev. 3 (1997) ("*Public Justice*"); R. Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra.Lab.L.J. 381 (1996); J. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash.U.L.Q. 637 (1996); S. Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 Berk.J.Empl.&Lab.L. 131 (1996); D. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wisconsin L.R. 33 (1997).

D. Unilaterally Imposed Arbitration Is Inconsistent with the Consensual Underpinnings of Arbitration, and Forces the Courts to Constantly Review the Validity and Fairness of Agreements

1. From Both a Legal And a Policy Perspective, "Voluntariness" Is the Key to the Enforceability of Arbitration Agreements

Arbitration is only viable, from either a legal or policy perspective, if it is the result of a truly voluntary agreement by the parties, who are aware of arbitration's strengths and limitations, and who have freely decided to use that process to settle a particular dispute. Without this element of a knowing, voluntary agreement, there is no legal or moral justification for enforcing an arbitration agreement.

The National Academy of Arbitrators has stressed that

> . . . the strength and justification for the enforcement of agreements to arbitrate, and for the limited judicial review of arbitration awards, rests on the foundation that agreements to arbitrate be voluntary . . . unless a party has agreed to arbitrate, it will not be compelled to do so. Likewise, the immunity from judicial review of an arbitrator's alleged error of law or fact is premised on the voluntary choice of the parties to submit to an arbitrator's judgment. Without the voluntariness of the arbitration agreement, the public policy favorable to arbitration lacks a foundation.

Academy Amicus Brief in *Duffield*, p. 16.

This emphasis on "voluntariness" is consistent with this Court's own pronouncement that arbitration under the FAA is "a matter of consent, not coercion." *Mastrobuono v. Shearson-Lehman*, *supra*, 115 S.Ct. at 1216. And, it is consistent with the strict standard traditionally required by the courts before finding a valid waiver of constitutional and statutory rights, i.e., a *knowing* and *voluntary* waiver.[45] An agreement to arbitrate in the employment setting is a

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[45] *Leasing Service v. Crane*, 804 F.2d 828, 832-33 (4th Cir. 1986) (constitutional right to jury trial is fundamental; any purported waiver of that right (continued...)

waiver of both constitutional rights (jury trial, Article III court, due process) and statutory rights under the civil rights laws.

2. Arbitration Agreements Drafted and Imposed by Employers Are Subject to Abuse

Our system of justice is an adversarial one. The ability of employers to draft arbitration agreements and then impose them on prospective (or existing) employees as a non-negotiable condition of employment invites abuses by those who control the process. Inevitably, employers have taken advantage of this power, by drafting arbitration agreements which slant the process distinctly in their favor.[46]

(...continued)
must be both knowing and voluntary; party claiming waiver has burden of showing that consent to the waiver was voluntary and knowing); *KMC v. Irving Trust*, 757 F.2d 752, 756 (6th Cir. 1985) (constitutional right to jury trial may be contractually waived only if done knowingly, intentionally and voluntarily); *Prudential v. Lai*, *supra* (requiring knowing waiver of statutory rights, remedies and procedural protections under Title VII); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997) (requiring "knowing and voluntary" waiver of statutory rights under the civil rights laws); cf. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972) (consumer did not waive constitutional due process rights to notice and a hearing when she signed an adhesion contract permitting seller to seize property she had purchased upon non-payment of monthly installment obligations; court noted absence of true "voluntariness" and lack of economic power of consumer).

[46] Thus, mandatory arbitration agreements in recent years have contained the following elements which put the weaker party at a severe disadvantage: (1) a limitation on the remedies an employee may recover, i.e., no tort damages, or no punitive damages (*Paladino v. Avnet Computer*, *supra*; *Stirlen v. Supercuts* (1997) 51 Cal.App.4th 1519; *Great Western Mortgage Co. v. Peacock*, 110 F.3d 222 (3d Cir. 1997); *Hooters of America v. Phillips*, Case No. 4:96-3360-22 (D.S.C., March 12, 1998)); (2) limitations on the discovery available prior to the arbitration (which inevitably works to the disadvantage of the plaintiff), *Hooters of America v. Phillips*, *supra*; (3) controlling the panel of arbitrators (*Rosenberg v. Merrill Lynch*, *supra*; *Cheng-Canindin v. Renaissance Hotel* (1996) 50 Cal.App.4th 676; *Hooters of America v. Phillips*, *supra*; *Graham v. Scissor-Tail* (1981) 28 Cal.3d 807, 623 P.2d 165); (4) requiring arbitration in some distant location (*Patterson v. ITT Consumer* (continued...)

3. Courts Are Constantly Being Required to Determine The Validity of Involuntary Employment Arbitration Agreements

In the wake of *Gilmer*, employers have been quick to impose adhesion arbitration clauses on prospective (and existing) employees. As discussed above, the legality and enforceability of such agreements is highly questionable, both from a legal and a policy standpoint.

The courts' dockets are now filled with cases in which employees challenge these coercive arbitration agreements as invalid and unenforceable. The courts are then forced to evaluate both the substance of an arbitration agreement (fundamental fairness of the procedures, due process, unconscionability, etc.), and the circumstances surrounding the creation of the agreement (to determine whether the agreement was "knowing," "voluntary," the product of undue duress or coercion, etc.). Unfortunately, as long as employers continue to require arbitration as a pre-dispute condition of employment, these challenges will continue, and the courts will remain busy evaluating the validity of every such agreement.

The solution to this problem is simple, and follows logically from the concept of "voluntariness." If an arbitration agreement has been required by an employer as a condition of employment, then it is not "voluntary," and any such agreement should be unenforceable. The parties are always free, *after* a dispute has arisen, to voluntarily decide that arbitration is the best method of resolving their particular dispute.

(...continued)
Financial (1993) 14 Cal.App.4th 1659, 18 C.R.2d 563); (5) unilateral agreements, which require the employee to arbitrate, but which permit the employer to go to court (*Stirlen v. Supercuts, supra*); (6) shortening the statute of limitations (*Graham Oil v. ARCO, supra*; *Stirlen v. Supercuts, supra*); (7) ensuring that the employer dominates and controls the arbitration process, such as having the power to control what discovery is permitted or who can testify (*Cheng-Canindin v. Renaissance Hotel, supra*; *Rosenberg v. Merrill Lynch, supra*); and (8) forbidding the arbitrator from awarding attorneys fees or costs, regardless of whether statutes provide such remedies to prevailing plaintiffs (*Stirlen v. Supercuts, supra*; *Paladino v. Avnet Computer, supra*; *Hooters of America v. Phillips, supra*; *Graham Oil v. ARCO, supra*).

The parties themselves will then be empowered to ensure fairness, by identifying neutral arbitrators and selecting fair procedures. If they have knowingly and voluntarily agreed to use arbitration under these circumstances, then neither party will be going to court to "challenge" the agreement and the courts will be relieved of a substantial burden.

CONCLUSION

Parties certainly have the right to waive constitutional rights. But those rights cannot be taken away by employers with excessive market leverage. The courts need to respect their very reason for being: to protect the constitutional rights of the citizenry and to properly interpret and enforce the laws of Congress. If the courts ensure that fundamental rights may only be waived knowingly and voluntarily, and if they place responsibility for ensuring fairness on the parties, then—and only then—will alternative dispute resolution fulfill its promise.

Amici ask the Court to reverse the decision of the Fourth Circuit, and so uphold the right of an employee to have access to a federal court judge and jury in order to vindicate his or her statutory employment rights.

Respectfully submitted,

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APPENDIX

DESCRIPTION OF AMICI CURIAE

The NATIONAL EMPLOYMENT LAWYERS ASSOCIATION ("NELA") is a national bar association with over 3,000 member lawyers in all fifty states, the District of Columbia, Puerto Rico and the Virgin Islands. NELA was founded in 1985. Its members include most of the leading employment lawyers who practice law primarily on behalf of employees. NELA members have represented, and continue to represent, tens of thousands of victims of employment discrimination, in federal and state courts. NELA members' clients will be significantly harmed, as will the public, if employers who violate the nation's civil rights laws are permitted to require—as a condition of employment—that employees submit to arbitration.

For an employee, compulsory arbitration means forfeiting numerous constitutional and statutory rights. Empirical and statistical evidence, as well as the experience of NELA members over the last 10 years, confirms that mandatory arbitration is not "just another forum" for the vindication of statutory employment rights. To the contrary, mandatory arbitration puts employees at a severe disadvantage, and transforms their statutory entitlements into a matter of arbitral discretion.

NELA fully supports and encourages the use of all forms of alternative dispute resolution (including arbitration), *provided* that the parties to a dispute *knowingly and voluntarily* agree that the mechanism chosen is the best method for resolving their dispute. However, employees who are *required* to submit to arbitration as a condition of obtaining or keeping employment have not entered into a "voluntary" agreement to arbitrate. Rather, their submission is a product of employer coercion. Under these circumstances, there is neither a legal nor a policy justification for enforcing such agreements.

The ASSOCIATION OF TRIAL LAWYERS OF AMERICA ("ATLA") is a voluntary national bar association whose approximately 50,000 members from around the country primarily represent personal injury plaintiffs and plaintiffs seeking to vindicate rights under federal statutes, including the Americans with Disabilities Act and the civil rights acts.

ATLA and its members are primarily concerned that access to justice be preserved for workers who may be subjected to various forms of employment discrimination. In ATLA's view, alternative dispute resolution on a truly voluntary basis may offer advantages to both employers and employees. However, employers have used mandatory arbitration to dilute and undermine those rights that Congress specifically put in place to protect workers from over-reaching employers. ATLA regards the notion that employer-designed mandatory arbitration should take precedence over the right to trial by jury, expressly guaranteed in the Constitution of the United States and nearly every state constitution, as deeply disturbing.

For these reasons, the issues presented in this case are of great concern to ATLA and its members. At the same time, it is ATLA's view that its long experience defending the rights of access to justice and trial by jury will assist this Court in addressing these issues.

The NOW LEGAL DEFENSE AND EDUCATION FUND ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational service in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, including mandatory arbitration of employment discrimination claims under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act.

The DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC. ("DREDF") is a national law and policy center dedicated to protecting and advancing the civil rights of people with disabilities, and securing equal citizenship for all people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform work. In its efforts to promote the full integration of persons with disabilities into the American mainstream, DREDF provides legal representation to people with disabilities in both individual and class action cases on a broad range of issues, including employment-related issues. Nationally recognized for its expertise in the interpretation of disability civil rights laws, since its founding DREDF has also been involved in most disability

rights cases heard by the U.S. Supreme Court, and in the legislative process leading to the enactment of the Americans With Disabilities Act.

Founded in 1971, the NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES ("NPWF"), formerly known as the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. NPWF has placed special emphasis on equal employment opportunity by challenging sex-based discrimination in the courts, and by leading efforts to promote and enact employment policies such as the 1993 Family and Medical Leave Act, the Civil Rights Act of 1991, and the 1978 Pregnancy Discrimination Act.